

UNITED STATES BANKRUPTCY COURT  
DISTRICT OF DELAWARE

IN RE: . Case No. 01-01139 (JKF)  
. Jointly Administered  
W.R. GRACE & COMPANY, .  
et al., . 5414 U.S. Steel Tower  
. 600 Grant Street  
. Pittsburgh, PA 15219  
Debtors. .  
. July 9, 2009  
. 9:37 a.m.  
. . . . .

TRANSCRIPT OF TELEPHONIC HEARING  
BEFORE HONORABLE JUDITH K. FITZGERALD  
UNITED STATES BANKRUPTCY COURT JUDGE

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1 THE COURT: Good morning. This is the matter of W.R.  
2 Grace, Bankruptcy Number 01-1139. I am appearing by phone, as  
3 well as the other participants. I just want to make sure that  
4 in Pittsburgh we're set up for recording.

5 COURT CLERK: Yes, Judge. This is Mona.

6 THE COURT: Okay. Would you read the list of  
7 participants please, Mona?

8 COURT CLERK: Yes. Scott Baena, Janet Baer, David  
9 Bernick, David Blabey, Jeffrey Boerger, Thomas Brandi, Michael  
10 Brown, Elizabeth Cabraser, Richard Cobb, Tiffany Cobb, Andrew  
11 Craig, Leslie Davis, Elizabeth DeCristofaro, Elizabeth Devine,  
12 Martin Dies, Terence Edwards, Lisa Esayian, Sander Esserman,  
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24 Daniel Speights, Shayne Spencer, Laura Stover, Theodore  
25 Tacconelli, Edward Westbrook, Jennifer Whitener, Jeffrey

1 Wisler, Richard Wyron, Rebecca Zubaty. That's all.

2 THE COURT: All right. Thank you. Ms. Baer?

3 MS. BAER: Thank you, Your Honor. Your Honor, there  
4 are a couple of matters on the agenda today which are holdovers  
5 from the June 29th hearing. And I want to take things a little  
6 out of order because I'm pleased to announce that Agenda Items  
7 12, 13 and 14, which are the Anderson Memorial Hospital and two  
8 other related claimants' motions for temporary allowance of  
9 their claim, have been resolved.

10 We've reached a resolution with Mr. Speights' counsel  
11 whereby the debtors are willing to count the three claims for  
12 which he has filed motions as no votes to the plan in Class 7A  
13 for the 524(g) vote that has been taken under the plan.

14 Your Honor, this agreement would be without prejudice  
15 to any objections that Mr. Speights and his clients have filed  
16 to the plan with respect to the classification or impairment of  
17 these claims under the plan and how the claims might be treated  
18 in the event that an objection may be sustained. Likewise, the  
19 agreement is without prejudice to the plan proponents' argument  
20 that confirmation with respect to the classification and  
21 treatment of the claims under the plan.

22 It's also without prejudice to either party's  
23 position on the plan objection, and also as to the appropriate  
24 procedures with respect to voting or allowance for voting  
25 purposes with respect to the three claims in the event that the

1 plan objections are sustained and the Court is required to  
2 consider whether a re-vote of the class is required.

3 Your Honor, we would propose to prepare an order that  
4 summarizes and outlines the fact that this matter has been  
5 resolved in that manner, and that will take care of the  
6 temporary voting motion.

7 THE COURT: Mr. Speights?

8 MR. ROSENDORF: Good morning, Your Honor. This is  
9 David Rosendorf on behalf of Mr. Speights.

10 THE COURT: Good morning.

11 MR. ROSENDORF: The -- we did have these  
12 conversations and I can confirm that the agreed resolution, as  
13 has been described, is acceptable to the claimant. The simple  
14 idea is that they will be counted as no votes for purposes of  
15 the (indiscernible) of the 524(g) vote, and it is without  
16 prejudice to the other plan objections and issues that we have  
17 raised, including dealing with how those claimants would vote  
18 in the event that those objections are recognized by the Court.

19 THE COURT: All right. That's fine. Ms. Baer, if  
20 you'll submit an order. Obviously, run it by Mr. Rosendorf  
21 first on a COC. Then I'll enter the order with respect to  
22 Items 12, 13 and 14 orders when I receive them.

23 MS. BAER: I will do so, Your Honor. Thank you.

24 MR. ROSENDORF: Thank you, Your Honor.

25 THE COURT: Okay.

1 MS. BAER: Your Honor, that takes us back to the  
2 first item on the agenda, Agenda Item Number 11 which is the  
3 Libby Claimants' motion to strike the expert reports of Thomas  
4 Florence. And I believe that Mr. Cohen is on the phone.

5 THE COURT: Mr. Cohen?

6 MR. KOVACICH: Your Honor, this is Mark Kovacich. I  
7 don't believe Dan Cohen is on the telephone, but I am  
8 representing the Libby Claimants on this call today.

9 THE COURT: All right. It's your motion, sir. Go  
10 ahead.

11 MR. KOVACICH: Thank you, Your Honor. Dr. Thomas  
12 Florence was disclosed only as a rebuttal witness, and the  
13 report that he prepared for purposes of the disclosure is  
14 titled as a rebuttal to a previous expert report of Dr. Allen  
15 Whitehouse. The substance of the report, however, has no  
16 relationship whatsoever to any opinion that Dr. Whitehouse has  
17 offered.

18 Dr. Whitehouse is a pulmonologist and a medical  
19 doctor. He's going to testify about the nature of disease in  
20 his patients in Libby Montana and the nature of disease he's  
21 observed elsewhere. And he's also going to provide some  
22 testimony about the medical criteria in the trust distribution  
23 procedures from a medical standpoint.

24 Dr. Florence, on the other hand, did a statistical  
25 analysis where he's looked at a sample of claims and then

1 actually didn't even do the classification himself. He's  
2 relied on apparently some individuals who worked for the  
3 Celotex trust to classify those claims under the disease  
4 categories for non-malignant claims in TDP. And then he shows  
5 what the distribution of claims is from that sample, how those  
6 claims are distributed among those different disease  
7 categories. It has absolutely nothing to do with any opinion  
8 that Dr. Whitehouse disclosed in his December 2008 report.

9           The report of Dr. Florence doesn't even mention Dr.  
10 Whitehouse, his opinions or his report, except in the title and  
11 in the introductory paragraph where it discusses what Dr.  
12 Florence was asked to do by counsel. In the debtors' response  
13 to the Libby Claimants' motion to exclude Dr. Florence, there  
14 is similarly a conclusory statement that this is rebuttal of  
15 Dr. Whitehouse, but the response fails to explain how Dr.  
16 Florence's opinions addressed any opinion that Dr. Whitehouse  
17 has to offer.

18           The only citation to Dr. Whitehouse's report in the  
19 debtors' response is to Page 1 and then Pages 62 through 73. I  
20 can only assume that the reference to Dr. Whitehouse's report  
21 on Page 1 is to the statement that he'll compare asbestos  
22 disease from Libby asbestos to asbestos disease from chrysotile  
23 asbestos. Dr. Florence is not in a position to comment on the  
24 comparison of disease caused by different types of asbestos.

25           The discussion in the Whitehouse report at Pages 62

1 through 73 talks about the medical criteria and how some of  
2 those criteria are not part of the diagnostic criteria for any  
3 disease. And then that includes a discussion of how certain of  
4 those criteria would exclude patients who were deceased of  
5 asbestos disease from the category for severe non-malignant  
6 disease.

7           The point of that opinion is that the criteria takes  
8 claimants who are severe because they've died of asbestos  
9 disease or because they have severe disability as demonstrated  
10 by lung function testing. And it lumps them into a different  
11 category along with claimants who do not have similarly severe  
12 disease.

13           Dr. Whitehouse has not attempted to take a random  
14 sample or complete sample of claimants and comment on how many  
15 of them would fall under the severe category versus any other  
16 category. And that's all that Dr. Florence's report does. It  
17 looks at this random group of claimants from the claimants as a  
18 whole and shows what percentage of the non-malignant claimants  
19 falls under each of these various categories.

20           Neither Dr. Whitehouse nor the counsel representing  
21 the Libby Claimants have any intention of commenting on what  
22 percentage of non-malignant claimants would fall under the  
23 various disease categories like that.

24           So, this clearly is not a rebuttal to anything that  
25 Dr. Whitehouse has to say. To the extent that Dr. Rodricks

1 would offer opinions about what disease category some claimant  
2 falls under, he's not qualified to do that. The people who  
3 actually reviewed information about these claims and  
4 categorized them are not listed as witnesses. We don't know  
5 anything about their qualification. We don't have the  
6 information from which those designations were made such that  
7 we can examine a witness who actually determined which of these  
8 claimants fell under which category.

9           So, to the extent there is any medical component to  
10 this report, the witness isn't the proper witness to provide  
11 that testimony, in any event. Rebuttal evidence, I want to  
12 quote from a Fourth Circuit decision. This is United States v.  
13 Stitt, S-t-i-t-t, 250 F.3d 878 at Page 897. "Rebuttal evidence  
14 must be reasonably tailored to the evidence it seeks to refute.  
15 There must be a nexus between the purported rebuttal evidence  
16 and the evidence that the purported rebuttal evidence seeks to  
17 rebut."

18           In this instance, the evidence offered from Dr.  
19 Florence simply has no relationship to any evidence that will  
20 be offered by Dr. Whitehouse. It's not proper rebuttal  
21 evidence and it should be excluded.

22           THE COURT: All right. Who's arguing for the debtor?

23           MS. HARDING: Your Honor, this is Barbara Harding.  
24 I'm arguing on behalf of the debtor.

25           THE COURT: All right.

1 MS. HARDING: Your Honor, the debtors believe that  
2 this is not even a close question. The first point I'd like to  
3 make is that if Dr. Whitehouse had contained his opinion to  
4 those surely of pulmonology, then perhaps we would not have  
5 needed a report from Dr. Florence. But, that's not what Dr.  
6 Whitehouse does. He ventures into the expertise of  
7 epidemiologist and statistician, and that is why a report from  
8 Dr. Florence was necessary, simply to rebut aspects of Dr.  
9 Whitehouse's report; certainly not his full report. We have  
10 other experts that are addressing the medical issues raised by  
11 Dr. Whitehouse.

12 But, I think the easiest answer to the Libby  
13 Claimants' motion is that it's just not accurate,  
14 scientifically or legally, to state that Dr. Florence's report  
15 is not a rebuttal report. It seems to show just a profound  
16 misunderstanding of the scientific issues in the case, and I  
17 think a misunderstanding of the law as to what constitutes  
18 proper rebuttal.

19 In his report Dr. Whitehouse claims that the TDPs are  
20 discriminatory when applied to the Libby Claimants. He goes on  
21 to talk about the impact of the TDP on the Libby Claimants, and  
22 as I said, claims that it's discriminatory as to them, but he  
23 never addresses the effect or impact of the TDP on non-Libby  
24 Claimants.

25 So, without some reference to that, it's impossible



1 for the Court to assess whether it's discriminatory or not.  
2 Dr. Florence does. He does attempt to do a scientific analysis  
3 that assesses the impact of the TDP on non-Libby Claimants.  
4 And it does tend to cast doubt on Dr. Whitehouse's claim about  
5 discrimination.

6           Scientifically, I think it's as if the Libby  
7 Claimants are saying that, well, we didn't do a scientific  
8 epidemiological statistical analysis, therefore you cannot. It  
9 really -- it does not make any sense to make that argument. I  
10 mean, Dr. Florence has attempted to do a valid statistical  
11 analysis of the impact of the TDP on non-Libby Claimants, and  
12 the fact that Dr. Whitehouse did not attempt to do any kind of  
13 scientific statistical analysis but just made anecdotal  
14 observations about the impact of the TDP on his claimants, I  
15 think is something that we obviously will raise with respect to  
16 a Daubert motion, but certainly isn't a reason why Dr.  
17 Florence's report isn't proper rebuttal report.

18           The second point I'd like to make, Your Honor, it  
19 really raises a little bit of a bigger problem and something  
20 that the Court is somewhat familiar with already, and that is,  
21 the moving target that has been called Dr. Whitehouse's  
22 opinions in this case, his opinions keep changing. His  
23 reliance materials keep changing. His population that he  
24 supposedly is studying keeps changing. And as such, some of  
25 our responsive work is ongoing.

1 Dr. Weil's deposition has not -- has been delayed in  
2 this case, so he can conclude his responsive work to Dr.  
3 Whitehouse -- Dr. Whitehouse's most recent production which was  
4 in mid-June. And the point here is, even if there were any  
5 grain of accuracy to the Libby Claimants' contention that Dr.  
6 Florence was not proper rebuttal at the time that he filed it,  
7 which we do not believe is true, not for a second, but there is  
8 now a complete record in Dr. Whitehouse's rebuttal reports, his  
9 surrebuttal report, his deposition testimony where Dr.  
10 Whitehouse is purporting to make statistical extrapolations and  
11 analyses from his work and his population. And Dr. Florence's  
12 report is obviously directly responsive to those opinions and  
13 analyses that have evolved as the case has proceeded.

14 And then the final point I just wanted to make, Your  
15 Honor, and it's really an aside, but there seems to be an  
16 argument in counsel's statements that related to the underlying  
17 reliance materials and the work that Dr. Florence did. The  
18 Libby Claimants haven't taken Dr. Florence's deposition yet.  
19 There's been no complaint about his reliance materials. We've  
20 received no requests for them. We've received no requests for  
21 additional reliance materials or any additional discovery  
22 related to Dr. Florence's report.

23 We think that he has provided all of his reliance  
24 materials and everything that's there is proper. There's  
25 simply been no complaint either in their motion or to date on

1 that issue. So, I wanted to make sure that the Court was aware  
2 of that.

3 THE COURT: All right. Back to the Libby Claimants.  
4 Anything else you'd like to state?

5 MR. KOVACICH: Yes, Your Honor. Just that I still  
6 have not heard how the substantive portion of Dr. Florence's  
7 report and opinion addresses anything that Dr. Whitehouse has  
8 to say. Counsel comments that Dr. Whitehouse provides opinions  
9 on how the medical criteria are discriminatory, and then states  
10 in a conclusory fashion that Dr. Florence does a statistical  
11 analysis of non-Libby Claimants to show that they are not.  
12 But, there's a disconnect between what Dr. Whitehouse says and  
13 what Dr. Florence's report addresses.

14 Dr. Florence takes these 1500 claimants, or whatever  
15 it was, and then says what percentage of those claimants falls  
16 under these various categories. Well, so what? That doesn't  
17 respond to any of the arguments that the Libby Claimants have  
18 made, and it doesn't respond to any opinion that Dr. Whitehouse  
19 has to offer. So, I think we're still in the dark as to how  
20 this actually rebuts an opinion from Dr. Whitehouse.

21 And as to the comment on reliance materials, as far  
22 as I know, I agree with counsel. There hasn't been any  
23 discussion about Dr. Florence's reliance materials. That  
24 wasn't the point of my comment. The point of my comment is  
25 that there's an underlying medical opinion in this report of

1 Dr. Florence which is how these various claimants are  
2 categorized from a medical standpoint, and Dr. Florence isn't  
3 qualified to address that and the people who actually made  
4 those designations are not listed as witnesses and we won't  
5 have the opportunity to examine them as to how they made these  
6 medical determinations.

7 THE COURT: All right. Well, I understood Ms.  
8 Harding to say that there are other witnesses who will discuss  
9 the medical issues, specifically. I don't know who they are,  
10 but nonetheless, that's what she said. That Dr. Florence's  
11 report is obviously not designed to address the medical  
12 criteria per se, but is to take a look at Dr. Whitehouse's  
13 conclusion that the TDPs, as structured, are discriminatory,  
14 and he did a different type of analysis than Dr. Whitehouse  
15 did.

16 It seems to me that at this point without having  
17 heard the witnesses, and so I reserve the right to change my  
18 mind about this when I do hear the witnesses, but just looking  
19 at the reports it seems to me that it's fair rebuttal. Whether  
20 it will come out that way at the time of trial or not, I don't  
21 know.

22 So, I reserve the right to change my mind about this,  
23 but for now just looking at the reports and seeing what the  
24 issues are that the parties have raised, it seems to me that  
25 this will be fair rebuttal. But, what the rebuttal will

1 actually be until I hear the witnesses' testify or see what  
2 you're proffering from those witnesses, I think it's premature  
3 for me to be making that kind of determination.

4           You know, if Dr. Whitehouse doesn't testify to  
5 certain things, then rebuttal reports aren't necessary. But,  
6 from looking at them as they stand right now without the  
7 benefit of the witnesses, I believe it's their rebuttal, and I  
8 don't see a basis to strike the report. But, again, I'm making  
9 this determination without prejudice to changing my mind when  
10 the evidence is actually proffered.

11           So, I will, I suppose, do an order that indicates  
12 that I am not granting the motion to strike right now, but it's  
13 without prejudice to the Libby Claimants raising it again at  
14 the time of trial.

15           MS. HARDING: Thank you, Your Honor.

16           MR. KOVACICH: Thank you.

17           THE COURT: Okay. Anything else?

18           MS. BAER: Your Honor, we'll prepare an order along  
19 those lines with respect to Dr. Whitehouse and circulate it to  
20 the Libby Claimants for their review.

21           THE COURT: All right. That's fine.

22           MS. BAER: Your Honor, the only other matter on the  
23 agenda was the quarterly fee applications which had been  
24 continued over to June -- from the June 29th hearing, and in  
25 the meantime you have entered an order on those, so I think

1 that we are all taken care of there.

2 THE COURT: Okay.

3 MS. BAER: Your Honor, that concludes the agenda.

4 THE COURT: All right. Anybody have any matters to  
5 raise? Okay. We're adjourned. Thank you.

6 MS. BAER: Thank you, Your Honor.

7 MS. HARDING: Thank you, Your Honor.

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**C E R T I F I C A T I O N**

\_\_\_\_I, KATHLEEN BETZ, court approved transcriber,  
certify that the foregoing is a correct transcript from the  
official electronic sound recording of the proceedings in the  
above-entitled matter, and to the best of my ability.

/s/ Kathleen Betz \_\_\_\_\_DATE: July 15, 2009

KATHLEEN BETZ

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